



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 31, 1995

Mr. Raymond Winter
Staff Attorney
Texas Natural Resource
Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR95-052

Dear Mr. Winter:

The Texas Natural Resource Conservation Commission ("TNRCC") received a request for information about an investigation and other actions concerning leaking hydrocarbons from a named site. You contend that the requested information is excepted from disclosure under section 552.103(a). To show the applicability of section 552.103(a), a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4.

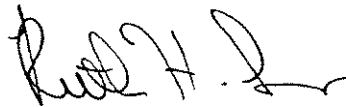
TNRCC has met its burden of showing that litigation is pending by providing documents showing that The Bordeaux Group, Ltd. ("Bordeau") has filed suit against TNRCC and the Attorney General for the State of Texas concerning payment of claims for reimbursement. You have submitted to this office for review as responsive to the request records concerning claims for reimbursement that are related to the litigation.¹ However, absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 (1982) at 2. Most of the information you submitted to this office has already been seen by the opposing party to the pending litigation. Since the parties to the litigation have already had access to or seen these documents there is no justification under section 552.103(a) for now withholding these records from the requestor. We have marked the records that must be released.

¹Your letter refers to the requestor's letter of October 25, 1994. You state that the requestor asked for copies of applications for reimbursement and related correspondence. The requestor's October 25, 1994, letter asks for "information in the TNRCC files regarding the investigation and subsequent actions surrounding leaking hydrocarbons in the subsurface" at a named site. We assume that the applications for reimbursement and related correspondence submitted to this office are responsive to the request.

You may withhold the other submitted documents from disclosure under section 552.103(a) to the extent that the opposing party to the litigation has not already seen or had access to those documents. The applicability of section 552.103(a) also ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982) at 3. We note that since the section 552.103(a) exception is discretionary with the governmental entity asserting the exception, it is within TNRCC's discretion to release this information to the requestor. Gov't Code § 552.007; Open Records Decision No. 542 (1990) at 4.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Government Section

RHS/rho

Ref.: ID# 30297

Enclosures: Marked documents

cc: Mr. Jerry K. Barnhill
Director of Environmental Affairs
Clark Refining & Marketing, Inc.
8182 Maryland Avenue
St. Louis, Missouri 63105-3721
(w/o enclosures)

Mr. Tom Bohl
Assistant Attorney General
Environmental Protection Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
(w/o enclosures)